

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM F. TRAYNOR,

Plaintiff/Counter-Defendant,

v

DEER RUN ESTATES, L.L.C.,

Defendant/Counter-Plaintiff,

and

HENRY MANUEL

Defendant/Counter-Plaintiff/Cross-
Defendant-Appellant,

and

MICHAEL J. RUZYCKI,

Defendant/Cross-Plaintiff-Appellee,

and

FIRST NATIONAL BANK and TCF
MORTGAGE,

Defendants.

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant Henry Manuel appeals as of right from the trial court's order awarding sanctions of \$50,006.96 to cross-plaintiff Michael Ruzycki, pursuant to MCL 600.2591 and MCR 2.114. For the reasons set forth in this opinion, we affirm the trial court's award of sanctions.

Manuel and Ruzycki combined to form Deer Run Estates, L.L.C., for the purpose of developing a ten-acre parcel of property. They agreed that each would contribute financing for the project and that profits would be divided evenly when the project was completed and the property sold. Pursuant to the agreement between the parties, Ruzycki relied on Manuel to manage Deer Run's finances and other aspects of the project. Manuel obtained financing from plaintiff William Traynor, using the property as security for the loans. Traynor later initiated a foreclosure against Manuel, Ruzycki, and Deer Run. As part of this action, Ruzycki filed a cross-claim against Manuel, alleging that Manuel misappropriated funds belonging to Deer Run and failed to perform other contractual obligations. Traynor prevailed in his action, and Ruzycki prevailed in his cross-claim against Manuel. The trial court later awarded Ruzycki sanctions against Manuel, agreeing that Manuel's answer and affirmative defenses were frivolous.

Manuel argues that the trial court erred in finding that sanctions were warranted because his answer and affirmative defenses were frivolous. We review a trial court's finding that a defense was frivolous for clear error. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002).

MCL 600.2591 states:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). A factual assertion is not rendered frivolous merely because it is subsequently discovered to be untrue. *Id.* Similarly, a claim or defense is not frivolous merely because it is

based on an erroneous legal analysis. *Id.* Rather, the claim or defense must be completely groundless or “devoid of arguable legal merit.” *Id.*; MCL 600.2591(3)(a)(iii).

MCR 2.114 provides, in pertinent part:

(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

“Whether a claim is frivolous within the meaning of MCR 2.114(F) . . . depends on the facts of the case.” *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 168; 712 NW2d 731 (2005), quoting *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002). Errors in legal analysis do not necessarily constitute a frivolous position, and a court’s rejection of a party’s legal position does not mean that the party was acting frivolously in advocating its position. *Id.*

In this case, the substance of Ruzycki’s cross-complaint was that Manuel improperly diverted funds from the Deer Run account to himself, his son, or other payees unrelated to the project. Manuel did not deny the withdrawals or payments, but denied any inference that he was misappropriating the funds. However, he was never able to produce documentation showing that the transactions were in any way related to transactions involving Deer Run. At trial, he acknowledged that the bank ledger accurately reflected the withdrawals and payments, but failed to give any explanation regarding how most of the money was used. Although he testified that payments to his son, Nathan Manuel were compensation for services rendered to Deer Run, he admitted that he did not have any 1099 forms, wage forms, or tax returns to verify that Nathan was entitled to the \$13,640 as compensation for services performed for Deer Run. As the person responsible for managing the Deer Run account, only Manuel knew why withdrawals were made from the account and how the money was used. Manuel avoided direct answers to any of trial counsel’s questions concerning where large amounts of untraceable funds were spent. Manuel’s testimony was neither believable nor honest, and we therefore concur with the trial court’s finding that his testimony “was not credible in any respect.” The trial court was not obligated to

believe Manuel's innocent explanations for not being able to explain the withdrawals, such as forgetfulness or sloppy recordkeeping. The trial court did not clearly err in finding that Manuel asserted a factual defense without any reasonable basis for believing it to be true, and that sanctions were therefore justified under MCL 600.2591 and MCR 2.114.

Furthermore, Manuel never offered any factual support or legal analysis in support of his affirmative defenses of the statute of frauds, lack of capacity to sue, or absence of enforceable contract. Although Manuel argues that the trial court "did not consider that Manuel's counsel failed to even attempt to introduce any of the documentation provided in Manuel's trial brief, or that Manuel's chief counsel was unavailable for trial because of health problems," there is nothing in Manuel's trial brief or any other pleadings that explains the factual basis of these affirmative defenses. Additionally, substitution of counsel does not explain Manuel's failure to articulate any factual or legal basis for asserting these defenses. Accordingly, the trial court did not clearly err in finding that these defenses were devoid of arguable legal merit.

Manuel also argues that frivolous case sanctions were not warranted because he was successful on some of his defenses. Although the trial court did not directly address each of Ruzycki's individual claims, it did not rule in favor of Manuel on any of Ruzycki's claims. Contrary to what Manuel argues, the trial court did not fail to find that Ruzycki established fraud and misrepresentation. On the contrary, the trial court specifically stated that "Ruzycki presented sufficient evidence to support his claims of breach of contract and fraud." Although the trial court did not directly address Ruzycki's claim to quiet title, it awarded Ruzycki title to two of the parcels, thus granting him the relief he sought for that count.

Implicit in Manuel's argument is that Ruzycki was not a prevailing party within the meaning of MCL 600.2591(3)(b) because he did not prevail on the entire record. MCR 2.625 sets forth rules for taxation of costs, including costs for frivolous pleadings pursuant to MCL 600.2591. MCR 2.625(A)(2). MCR 2.625(B)(2) provides:

In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

When a plaintiff's complaint alleges alternative theories of liability arising out of the same transaction, there is a single cause of action, and the plaintiff is entitled to costs for the entire action, even if he did not prevail on every theory or count. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 520; 556 NW2d 528 (1996).

Here, all of the counts alleged in Ruzycki's complaint arose out of the same transaction, namely Manuel's misappropriation of Deer Run funds and his failure to fulfill his obligations to Ruzycki pursuant to their agreement. Accordingly, there was a single cause of action and Ruzycki was the prevailing party. It was not necessary for the trial court to order separate relief for each individual claim in order for Ruzycki to be the prevailing party. Therefore, this issue does not present a basis for appellate relief.

Finally, Manuel argues that the trial court improperly awarded attorney fees for clerical and secretarial time spent on the case. However, Manuel failed to challenge any of the items in

Ruzycki's attorney's billing statements when he had the opportunity to do so below. On the contrary, when the trial court asked whether any of the costs were not proper, Manuel's attorney replied, "I don't see the costs as improper." Therefore, this issue is not preserved and appellate relief is not available absent a plain error affecting substantial rights. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

MCR 2.626 provides that "[a]n award of attorney fees may include an award for the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article [I], § 6 of the Bylaws of the State Bar of Michigan." See also *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 411; 700 NW2d 432 (2005). None of the items in the billing statements clearly refer to non-attorney, clerical support tasks. Because Manuel did not object to the challenged items at the evidentiary hearing, we are left with no basis for concluding that they were not compensable under MCR 2.626. Accordingly, appellate relief is not warranted.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray